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ABDUL RAHMAN MOHD MERA

v.

TRANSNASIONAL EXPRESS SDN BHD & ANOR

B

HIGH COURT MALAYA, KUANTAN
MOHAMED APANDI ALI J
[CIVIL APPEAL NO: 12-21-2003]
13 FEBRUARY 2007

C ***ROAD TRAFFIC:*** *Negligence - Bus driver losing control of express bus and overturning - Passenger injured - Whether quantum of damages awarded fair and reasonable*

DAMAGES: *Personal injuries - Fracture of calcaneum - No operation required and injury not serious - No shortening of limb - Laceration wound over right*
D *lateral malleous - Cuts located on same fractured calcaneum - Quantum*

DAMAGES: *Personal injuries - Loss of future earnings - Only earnings at time of accident to be taken into account in computing loss of future earnings - Whether plaintiff's earning capacity affected after accident - Plaintiff's earning capacity improved after accident*

E

The plaintiff, a passenger in an express bus, was injured when the bus, driven by the 2nd defendant, lost control and overturned. The learned Sessions Court judge had refused to allow the plaintiff's claim for "loss of future earnings". Plaintiff also claimed that the award for general
F damages was very low. This was an appeal by the plaintiff against the learned judge's decision in respect of quantum only *ie*, "the loss of future earnings and the award for pain and suffering".

Plaintiff was working in a company until June 1997. He then quit his job and started working for his mother at her coffee shop from 1 July
G 1997 as a cook and a waiter for which he was paid RM50 per day. He met with the accident on 10 August 1997 and was unable to perform any work for six months after the accident. When he gave evidence in court on 10 March 2003, he had already started his own business, operating a coffee shop with his wife with a net income of RM3,000
H per month.

Held (dismissing the appeal and upholding the decision of the learned Sessions judge):

I **(1)** The law is clear that the plaintiff's earnings "at the time when he was injured" is the only relevant amount that shall be taken into account in computing any loss of future earnings. (para 13)

(2) The plaintiff had not shown that his condition deteriorated after the accident and affected his earning capacity, but on the other hand, his earning capacity improved after the accident. Therefore the plaintiff did not suffer any loss of earnings as regards to his income. (paras 15 & 16)

(3) With regards to the fracture of calcaneum, the plaintiff was in the process of full recovery and no operation was required as the injury was not serious. There was also no shortening of the limb. The award of RM20,000 was just and reasonable and not inordinately low. (para 19)

(4) With regards to the laceration wound over right lateral malleous, the award of RM3,000 was reasonable as the cuts were located on the same fractured calcaneum. (para 21)

Case(s) referred to:
Looi Gnan Peng v. Bay Tong Hai [2005] 1 CLJ 685 CA ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A

For the appellant - Harinder Singh; M/s Mahindar & Co
For the respondents - Esther Jayaraja; M/s Zaid Ibrahim & Co

Reported by Amutha Suppayah

JUDGMENT

Mohamed Apandi Ali J:

[1] This is an appeal by the plaintiff against my decision that was given on 14 June 2005 in respect of quantum only ie, "the loss of future earnings and the award for pain and suffering".

Facts Of The Case

[2] This claim arises from an accident which occurred on 10 August 1997. The plaintiff/appellant was a passenger in an express bus. The bus that was driven by the 2nd defendant had lost control of the said bus and overturned that caused plaintiff to suffer losses and injuries.

[3] The learned Sessions Court judge who heard the matter had refused to allow the plaintiff's claim for "the loss of future earnings", and that the award for general damages was said to be very low.

[4] The appeal on these issues has been dismissed. Hence this appeal.

Loss of Future Earnings

[5] Plaintiff (PW5) was working with a company known as Denta Ocean Construction until June 1997. He then had to quit his job as his employer's contract had expired It is pertinent to note that he quit his job before the date of the accident.

[6] After quitting his job with Denta Ocean Construction, he then started working for his mother (PW4) at her coffee shop from 1 July 1997, which was also before the said accident. He was a cook and a waiter at the coffee shop for which he was paid RM50 per day - (refer to pp. 26, 27 & 28 R/R).

[7] He met with an accident on 10 August 1997 and was unable to perform any work for six months after the accident. After that he went back to work with Denta Ocean Construction as a driver for a lesser pay compared to what he gets from his mother as a cook and waiter but the figure he received was not mentioned at all - (refer to p. 28 R/R).

[8] When he gave evidence in court on 10 March 2003, he has already started his own business, operating a coffee shop with his wife with a net income of RM3,000 per month – "Sekarang saya berniaga warung, berniaga dengan isteri. Pendapatan bersih kami RM3,000 sebulan - refer p. 28 R/R).

[9] From the evidence, it is clear that the plaintiff did not suffer any loss but instead he was drawing a better income after the accident. As stated earlier he stopped working for Denta Ocean Construction not because of his inability to work but he had to, because his employer's contract job expired. There was no evidence indicating that the company refused to renew his contract because of his injuries. He chose to work for his mother who offered a 'better pay' as claimed.

[10] His evidence shows that he is not having any problem with his income as there was no reduction at all. In fact, his business is doing well with a net income of RM3,000 a month.

[11] This shows that despite his injuries he could still work and eke out a better living. His injuries had also improved as confirmed by PW2, an orthopedic from HTAA who said in his evidence during cross examination (p. 23 R/R) that:

> Plaintif tidak datang follow up pada 21.1.98. Rawatan terakhir pada 4.11.97. Masa periksa Plaintif, berdasarkan pada laporan, sakit Plaintif sudah banyak berkurangan. Plaintif daIam proses pemulihan.

[12] For the purpose of assessing damages for 'loss of future earnings', s. 28A of the Civil Law Act 1956 applies, and it reads as follows:

Section 28A. Damages in respect of personal injury.

(2) In assessing damages under this section -

(a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the court shall take into account -

(i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured.

[13] The law is clear that the plaintiff's earnings "at the time when he was injured" is the only relevant amount that shall be taken into account in computing any loss of future earnings. The appellant's counsel was harping on the plaintiff's earnings during his employment with Denta Ocean Construction, whereas evidence in court shows that at the material time when the plaintiff was injured, he was not working with the said company. The plaintiff had stopped working with Denta Ocean Construction one month before the date of accident!

[14] In the case of *Looi Gnan Peng v. Bay Tong Hai* [2005] 1 CLJ 685, the Court of Appeal states that:

> It is trite that a claim for special damages must be proved and in relations to a claim for loss of future earnings, s. 28A of the Civil Law Act 1956 (the Act), provides that "damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury. ...

[15] In respect of the plaintiff's health, there was no evidence shown that the plaintiff was in good health but for the injury before the accident. Moreover, the plaintiff has not shown that his condition deteriorated after the accident and affected his earning capacity, but on the other hand, his earning capacity improved after the accident!

[16] An officer from the EPF (PW3) was also called to testify and said that based on the plaintiff's record (refer pp. 69 - 80 R/R) for 1998, the contribution is higher compared to the previous years. Therefore it is clear that the plaintiff did not suffer any loss of earnings as regards to his income. With that finding of fact, the appeal by the plaintiff on this issue is dismissed with costs and the decision of the Learned Sessions judge upheld.

General Damages

[17] As regards to the general damages, the injuries suffered as per the medical reports of Hospital Tengku Ampuan Afzan and the Kuantan Medical Center (pp. 64 & 68 R/R) are:

(a) fracture of calcaneum; and

(b) laceration wound over right lateral malleous.

Fracture Of Calcaneum

[18] For these injuries, PW1, an orthopedic from Kuantan Medical Center in his evidence (p. 16 R/R) has stated that:

> Kepatahan telah bercantum tetapi tidak ditahap optimum. ... Pesakit boleh berjalan seperti biasa. Boleh jalan tapi terencot-encot (limping). Tiada kependekan.

[19] PW2, an orthopedic from HTAA has also confirmed that plaintiff at the time he was assessed in November 1997, his condition has improved and he was in the process of full recovery. PW2 also in his evidence has not suggested any other treatment for this injury and there was no operation being performed on the plaintiff as the injury was not serious. He said:

> Saya tidak mengesyorkan rawatan lain untuk kecederaan ini ... Jika patahnya teruk saja pembedahan akan dilakukan. Untuk plaintif kami tidak buat pembedahan. Pembedahan tidak disyorkan, jadi kami tidak ada jumlah nilai rawatan.

[20] There is also no shortening of the limb and the medical report of Klinik Pakar Otopidik Nasiruddin also stated that "There is no limb length discrepancy" (p. 66 R/R). Therefore the award of RM20,000 is just and reasonable and is not inordinately low.

Laceration Wound Over Right Lateral Malleous

[21] The award of RM3,000 is reasonable as the cuts were located on the same fractured calcaneum. The plaintiff has submitted for RM4,000 as damages as there were scars but there was nowhere reported in the two medical reports about any appearing scars.

[22] Therefore the award given by the Learned Sessions judge is reasonable and there is no reason to disturb the award, and therefore the appeal by the plaintiff on this ground is dismissed with costs.